

2018 ADVANCED DUI

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THE EFFECTIVE USE OF DRE INSTRUCTORS

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The DRE As An Expert In Arizona

Perhaps the most difficult portion of a DRE trial for a prosecutor is persuading the court to qualify the DRE officer as an expert witness. This is because many judges have biases against officers being capable of other than “everyday” police work and, therefore, are predisposed to not recognize law enforcement officers as experts. Though it is not necessary in order to prevail in a DRE case, having the DRE officer established as an expert witness does make the DRE trial easier for the State.

No Arizona published opinions address the issue of whether the DRE officer can be qualified as an expert. Accordingly, one must look to general law on the subject. These principles will also apply to qualifying your toxicologist/criminalist as an expert.

I. IS THE EVIDENCE BEYOND THE KNOWLEDGE OF THE AVERAGE JUROR AND WILL IT ASSIST THE TRIER OF FACT?

The first hurdle one must meet in order to allow the officer to testify as an expert is to establish that the evidence will assist the trier of fact. This requirement is set forth in 17A A.R.S. *Rules of Evidence*, Rule 702. The relevant part states:

A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise... **(a)** the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;

The prosecutor must first establish that the proffered evidence is beyond the knowledge of the average juror and that expert testimony will assist the trier of fact in its determination of a fact at issue. *State v. Plew*, 155 Ariz. 44, 745 P.2d 102 (1987). The fact at issue in a DRE case is whether a drug or its metabolite, in addition to being in the defendant's system, caused the impairment noted by the officer. More to the point, it is whether the drug caused the defendant's ability to safely operate his or her vehicle to be impaired to the slightest degree under ARS § 28-1381(A)(1). For the *per se* charge under ARS § 1381(A)(3) it is simply was a drug listed in ARS. § 13-3401 in the defendant's system when he or she was driving.

Arizona courts have recognized that when the subject of the proffered evidence is one of common understanding, expert testimony is not needed and should not be allowed. *Plew, supra.*; *State v. Owens*, 112 Ariz. 223, 227, 540 P.2d 695, 699

(1995). The effects of a drug on a person, however, have been found to be beyond the common knowledge of the average juror. Accordingly, courts have found drug effects to be the proper subject of expert testimony. *State v. Betancourt*, 131 Ariz. 61, 62, 638 P.2d 728, 729 (App. 1981)(court of appeals did not “believe that the effect of LSD on the human mind is necessarily within the common experience and knowledge of the jury”); *State v. Burns*, 142 Ariz. 531, 691 P.2d 297 (1984)(held that expert testimony explaining the effect of LSD on a defendant would have been of value to the jury and should have been admitted); *Plew, supra*. (Arizona Supreme Court noted that expert testimony on the effects of cocaine impairment would be a relevant, proper subject conforming to a generally accepted scientific theory if presented by a qualified individual).

II. QUALIFIED EXPERT.

The next step is to prove that the DRE officer is an expert. As indicated above, under Rule 702, *supra*., the witness must be qualified by knowledge, skill, experience, training or education.” The standard to be applied is whether the witnesses’ knowledge on the subject is more extensive than that of the average person. *State v. Davolt*, 207 Ariz. 191, 84 P.3d 456 (2004); *State v. Bauer*, 146 Ariz. 134, 704 P.2d 264 (App. 1985).

The prosecutor must lay the proper foundation to qualify the officer as an expert. This is accomplished just as it would be for any expert. Simply highlight the officer’s training, education, and experience which provides him or her with more knowledge regarding drugs and their effects on the human body than the average person. The article entitled “The DRE as an Expert Witness” that is included in these materials, provides examples of areas to explore.

Arizona Courts have recognized law enforcement officers as experts in numerous published opinions. *See for example: Davolt, supra*. (officer qualified to testify as expert on blood spatter analysis. Training in blood splatter analysis merely consisted of: attending classes on crime scene management, one homicide investigation class, and watching two training videos on blood splatter analysis at the department. The court held “[w]hile this training is not extensive, it is significantly more extensive than the average person has received and is sufficient to allow the testimony to be heard by the jury”); *Desmond v. Superior Court*, 161 Ariz. 522, 779 P.2d 1261 (1989) (recognizing a police officer can be an expert witness in a DUI case, to relate blood alcohol content back to the time of driving, if the officer possesses superior knowledge, experience, or expertise); *State v. Carreon*, 151 Ariz. 615, 729 P.2d 969 (App. 1986) (officer permitted to testify as expert regarding whether drugs possessed by defendant were for sale); and *State v. Graham*, 135 Ariz. 209, 660 P.2d 460 (1983) (officer’s four years of law enforcement experience along with specialized training in homicide investigation qualified him as an expert to testify about conclusions made from observations of murder scene.)

With the proper foundation, a DRE officer should likewise qualify as an expert.

III. RULES 703 AND 704.

If the DRE officer is qualified as an expert witness, the areas that the officer will be allowed to testify to should be increased.

Evidence Rule 703 “Bases of Opinion Testimony by Experts” provides as follows:

An expert may base an opinion on facts or data in the case that the expert has been made aware of or personally observed. If experts in the particular field would reasonably rely on those kinds of facts or data in forming an opinion on the subject, they need not be admissible for the opinion to be admitted. But if the facts or data would otherwise be inadmissible, the proponent of the opinion may disclose them to the jury only if their probative value in helping the jury evaluate the opinion substantially outweighs their prejudicial effect.

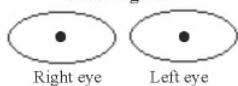

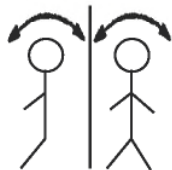
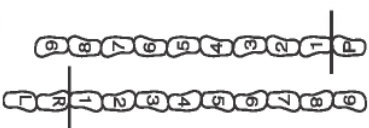
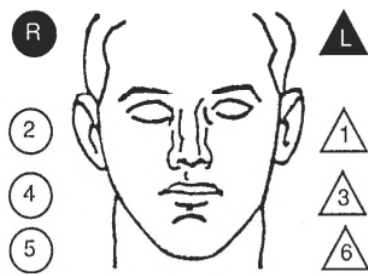
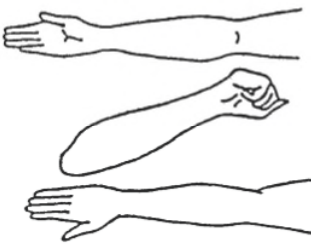
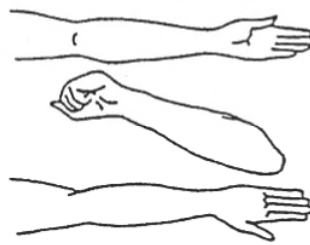
Under this rule, the expert may form an opinion based on hearsay and other inadmissible evidence. The former comments to the rule stress that the proponent must establish that facts or data “are of a type reasonably relied upon by experts.” As these comments point out, this is a question of law for the court to decide. If the underlying facts and data meet this requirement, and form the basis of admissible opinion evidence, they are generally admissible under Rule 703 for the limited purpose of providing the basis for the opinion.

IV. NON-EXPERTS

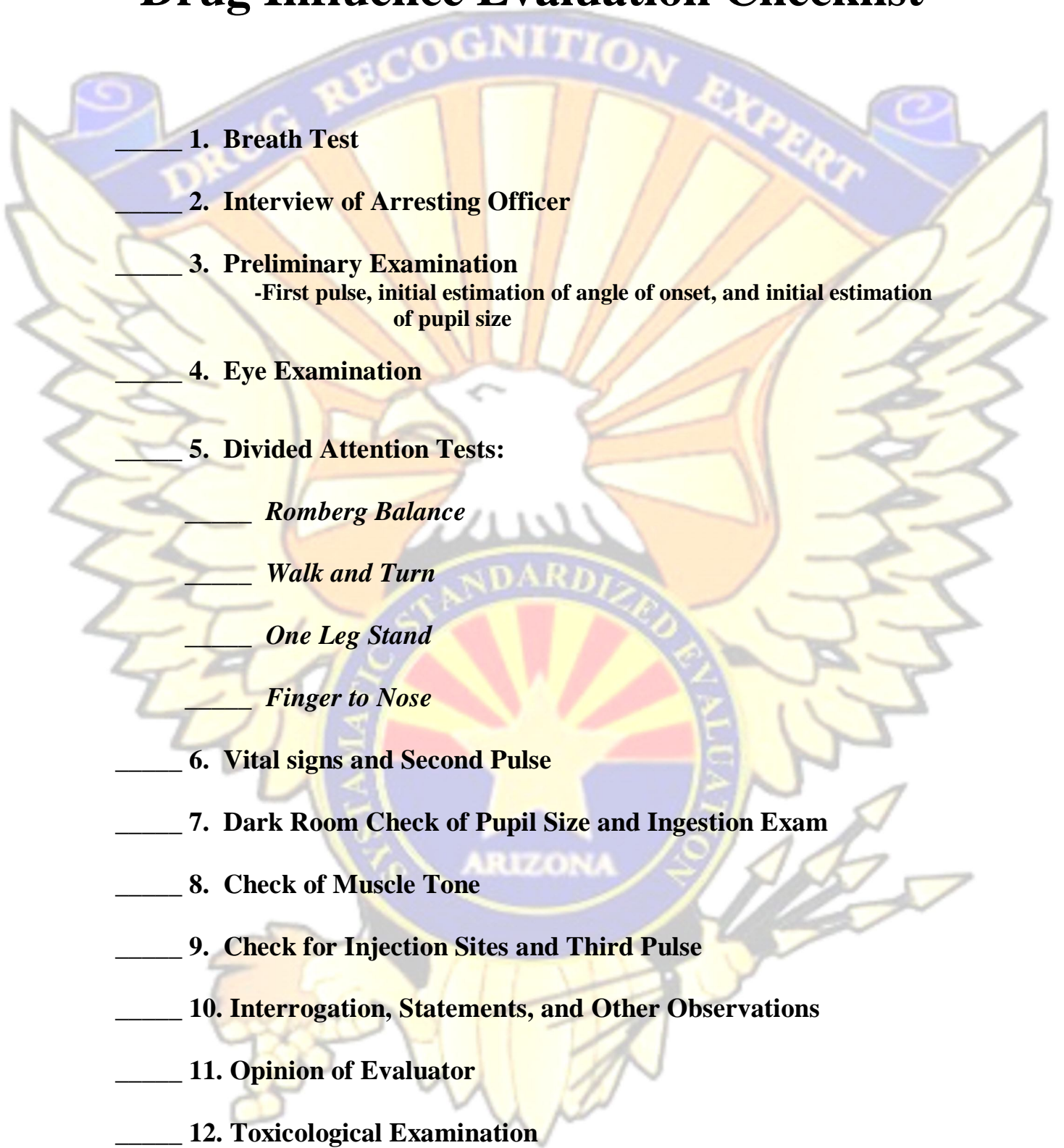
If the officer is not qualified as an expert, Rule 701 “[o]pinion testimony by lay witnesses” should govern.

If the witness is not testifying as an expert, the witness’ testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of the witness’ testimony or the determination of a fact in issue.

DRUG INFLUENCE EVALUATION

Evaluator		DRE #		Rolling Log #		Evaluator's Agency		Case #	
Recorder/Witness		Crash: <input type="checkbox"/> None <input type="checkbox"/> Fatal <input type="checkbox"/> Injury <input type="checkbox"/> Property				Arresting Officer's Agency			
Arrestee's Name (Last, First, Middle)		Date of Birth		Sex		Race		Arresting Officer (Name, ID#)	
Date Examined / Time / Location / /		Breath Test: Results:		Test Refused <input type="checkbox"/> Instrument #:		Chemical Test: Urine <input type="checkbox"/> Blood <input type="checkbox"/> Oral Fluid <input type="checkbox"/> Test or tests refused <input type="checkbox"/>			
Miranda Warning Given Given by:		<input type="checkbox"/> Yes <input type="checkbox"/> No		What have you eaten today? When?		What have you been drinking? How much?		Time of last drink?	
Time now/ Actual /		When did you last sleep?		How long?		Are you sick or injured? <input type="checkbox"/> Yes <input type="checkbox"/> No		Are you diabetic or epileptic? <input type="checkbox"/> Yes <input type="checkbox"/> No	
Do you take insulin? <input type="checkbox"/> Yes <input type="checkbox"/> No		Do you have any physical defects? <input type="checkbox"/> Yes <input type="checkbox"/> No				Are you under the care of a doctor or dentist? <input type="checkbox"/> Yes <input type="checkbox"/> No			
Are you taking any medication or drugs? <input type="checkbox"/> Yes <input type="checkbox"/> No				Attitude:		Coordination:			
Speech:		Breath odor:				Face:			
Corrective Lenses: <input type="checkbox"/> None <input type="checkbox"/> Glasses <input type="checkbox"/> Contacts, if so <input type="checkbox"/> Hard <input type="checkbox"/> Soft		Eyes: <input type="checkbox"/> Normal <input type="checkbox"/> Bloodshot <input type="checkbox"/> Watery		Blindness: <input type="checkbox"/> None <input type="checkbox"/> Left <input type="checkbox"/> Right		Tracking: <input type="checkbox"/> Equal <input type="checkbox"/> Unequal			
Pupil Size: <input type="checkbox"/> Equal <input type="checkbox"/> Unequal (explain)		Resting Nystagmus <input type="checkbox"/> Yes <input type="checkbox"/> No		Vertical Nystagmus <input type="checkbox"/> Yes <input type="checkbox"/> No		Able to follow stimulus <input type="checkbox"/> Yes <input type="checkbox"/> No		Eyelids <input type="checkbox"/> Normal <input type="checkbox"/> Droopy	
Pulse and Time 1. ____ / ____ 2. ____ / ____ 3. ____ / ____		HGN Lack of Smooth Pursuit Maximum Deviation Angle of Onset		Left Eye Right Eye		Convergence  Right eye Left eye		/30 One Leg Stand /30  L R	
Modified Romberg Balance Approx. Approx. 		Walk and Turn Test  Cannot keep balance _____ Starts too soon _____ Stops walking _____ Misses heel-toe _____ Steps off line _____ Raises arms _____ Actual steps taken _____							
Time Estimation ____ estimated as 30 seconds		Describe turn		Cannot do test (explain)		Type of footwear:			
Finger to Nose (Draw lines to spots touched) 		PUPIL SIZE Left Eye Right Eye		Room light (2.5 – 5.0)		Darkness (5.0 – 8.5)		Direct (2.0 – 4.5)	
								Nasal area: Oral cavity:	
								Reaction to Light:	
								Rebound Dilation: <input type="checkbox"/> Yes <input type="checkbox"/> No	
								RIGHT ARM 	
								LEFT ARM 	
Blood Pressure /		Temperature °F							
Muscle Tone: <input type="checkbox"/> Normal <input type="checkbox"/> Flaccid <input type="checkbox"/> Rigid									
Comments:									
What drugs or medications have you been using?		How much?		Time of use?		Where were the drugs used? (Location)			
Date / Time of arrest:		Time DRE was notified:		Evaluation start time:		Evaluation completion time:		<input type="checkbox"/> Subject refused entire evaluation <input type="checkbox"/> Subject stopped participating during evaluation	
Officer's Signature:		Reviewed/approved by / date:						DRE #	
Opinion of Evaluator:		<input type="checkbox"/> Not Impaired		<input type="checkbox"/> Alcohol		<input type="checkbox"/> CNS Stimulant		<input type="checkbox"/> Dissociative Anesthetic	
		<input type="checkbox"/> Medical		<input type="checkbox"/> CNS Depressant		<input type="checkbox"/> Hallucinogen		<input type="checkbox"/> Narcotic Analgesic	
								<input type="checkbox"/> Inhalant	
								<input type="checkbox"/> Cannabis	

Drug Influence Evaluation Checklist

- 
- ____ 1. **Breath Test**
 - ____ 2. **Interview of Arresting Officer**
 - ____ 3. **Preliminary Examination**
 - First pulse, initial estimation of angle of onset, and initial estimation of pupil size
 - ____ 4. **Eye Examination**
 - ____ 5. **Divided Attention Tests:**
 - ____ *Romberg Balance*
 - ____ *Walk and Turn*
 - ____ *One Leg Stand*
 - ____ *Finger to Nose*
 - ____ 6. **Vital signs and Second Pulse**
 - ____ 7. **Dark Room Check of Pupil Size and Ingestion Exam**
 - ____ 8. **Check of Muscle Tone**
 - ____ 9. **Check for Injection Sites and Third Pulse**
 - ____ 10. **Interrogation, Statements, and Other Observations**
 - ____ 11. **Opinion of Evaluator**
 - ____ 12. **Toxicological Examination**

DRUG CATEGORY SYMPTOMOLOGY MATRIX

MAJOR INDICATORS	CNS DEPRESSANTS	CNS STIMULANTS	HALLUCINOGENS	DISSOCIATIVE ANESTHETICS	NARCOTIC ANALGESICS	INHALANTS	CANNABIS
HGN	PRESENT	NONE	NONE	PRESENT	NONE	PRESENT	NONE
VERTICAL GAZE NYSTAGMUS	PRESENT * HIGH DOSES	NONE	NONE	PRESENT	NONE	PRESENT * HIGH DOSES	NONE
LACK OF CON-VERGENCE	PRESENT	NONE	NONE	PRESENT	NONE	PRESENT	PRESENT
PUPIL SIZE	NORMAL (1)	DILATED	DILATED	NORMAL	CONSTRICTED	NORMAL (4)	DILATED (6)
REACTION TO LIGHT	SLOW	SLOW	NORMAL (3)	NORMAL	LITTLE OR NONE VISIBLE	SLOW	NORMAL
PULSE RATE	DOWN (2)	UP	UP	UP	DOWN	UP	UP
BLOOD PRESSURE	DOWN	UP	UP	UP	DOWN	UP/DOWN (5)	UP
BODY TEMPERATURE	NORMAL	UP	UP	UP	DOWN	UP/DOWN/ NORMAL	NORMAL
MUSCLE TONE	FLACCID	RIGID	RIGID	RIGID	FLACCID	FLACCID OR NORMAL	NORMAL
GENERAL INDICATORS	UNCOORDINATED DISORIENTED SLUGGISH THICK, SLURRED SPEECH DRUNK-LIKE BEHAVIOR DROWSINESS DROOPY EYES FUMBLING GAIT ATAXIA BLOODSHOT WATERY EYES	RESTLESSNESS BODY TREMORS EXCITED EUPHORIC TALKATIVE EXAGGERATED REFLEXES ANXIETY BRUXISM – (GRINDING OF THE TEETH) REDNESS TO NASAL AREA RUNNY NOSE LOSS OF APPETITE INSOMNIA INCREASED ALERTNESS DRY MOUTH IRRITABILITY	DAZED APPEARANCE BODY TREMORS SYNESTHESIA HALLUCINATIONS PARANOIA UNCOORDINATED NAUSEA DISORIENTED SPEECH DIFFICULTIES PERSPIRING POOR PERCEPTION OF TIME & DISTANCE MEMORY LOSS FLASHBACKS PILOERECTION *NOTE: WITH LSD, PILOERECTION MAY BE OBSERVED (GOOSE BUMPS, HAIR STANDING ON END)	PERSPIRING WARM TO THE TOUCH BLANK STARE VERY EARLY ANGLE OF HGN ONSET SPEECH DIFFICULTIES INCOMPLETE VERBAL RESPONSES REPETITIVE SPEECH INCREASED PAIN THRESHOLD CYCLIC BEHAVIOR CONFUSED AGITATED HALLUCINATIONS POSSIBLY VIOLENT & COMBATIVE CHEMICAL ODOR “MOON WALKING”	PTOSIS – (DROOPY EYELIDS) “ON THE NOD” DROWSINESS DEPRESSED REFLEXES LOW, RASPY, SLOW SPEECH DRY MOUTH FACIAL ITCHING EUPHORIA FRESH INJECTION SITES TRACK MARKS NAUSEA *NOTE: TOLERANT USERS EXHIBIT RELATIVELY LITTLE PSYCHOMOTOR IMPAIRMENT	RESIDUE OF SUBSTANCE AROUND NOSE & MOUTH ODOR OF SUBSTANCE POSSIBLE NAUSEA SLURRED SPEECH DISORIENTED CONFUSION BLOODSHOT, WATERY EYES LACK OF MUSCLE CONTROL FLUSHED FACE NON COMMUNI- CATIVE INTENSE HEADACHES	MARKED REDDENING OF CONJUNC- TIVA ODOR OF MARIJUANA DEBRIS IN MOUTH BODY TREMORS EYELID TREMORS RELAXED INHIBITIONS INCREASED APPETITE IMPAIRED PERCEPTION OF TIME & DISTANCE DISORIENTED POSSIBLE PARANOIA
DURATION OF EFFECTS	BARBITURATES: 1-16 HOURS TRANQUILIZERS: 4-8 HOURS METHAQUALONE: 4-8 HOURS	COCAINE: 5-90 MINUTES AMPHETAMINES: 4-8 HOURS METHAMPHET- AMINES: 12 HOURS	DURATION VARIES WIDELY FROM ONE HALLUCINOGEN TO ANOTHER	ONSET: 1-5 MINUTES PEAK EFFECTS: 15-30 MINUTES EXHIBITS EFFECTS UP TO 4-6 HOURS	HEROIN: 4-6 HOURS METHADONE: UP TO 24 HOURS OTHERS VARY	VOLATILE SOLVENTS: 6 - 8 HOURS ANESTHETIC GASES AND AEROSOLS VERY SHORT DURATION	EUPHORIA: 2 - 3 HOURS IMPAIRMENT AY LAST UP TO 24 HOURS WITHOUT AWARENESS OF EFFECT.
USUAL METHODS OF INGESTION	ORAL INJECTED OCCASIONALLY	INSUFFLATION (SNORTING) SMOKED INJECTED ORAL	ORAL INSUFFLATION SMOKED INJECTED TRANSDERMAL	SMOKED ORAL INSUFFLATION INJECTED EYE DROPS	INJECTED ORAL SMOKED INSUFFLATION	INHALED	SMOKED ORAL
OVERDOSE SIGNS	SHALLOW BREATHING COLD CLAMMY SKIN PUPILS DILATED RAPID WEAK PULSE, COMA	AGITATION INCREASED BODY TEMPERATURE HALLUCINATIONS CONVULSIONS	LONG INTENSE TRIP	LONG INTENSE TRIP	SLOW SHALLOW BREATHING CLAMMY SKIN COMA CONVULSIONS	COMA	FATIGUE PARANOIA

FOOTNOTE: THESE INDICATORS ARE THE MOST CONSISTENT WITH THE CATEGORY. KEEP IN MIND THAT THERE MAY BE VARIATIONS DUE TO INDIVIDUAL REACTION, DOSE TAKEN AND DRUG INTERACTIONS.

NORMAL RANGES

PULSE: 60 - 90 BEATS PER MINUTE

PUPIL SIZE: ROOM LIGHT: 2.5 – 5.0 (AVERAGE 4.0)
NEAR TOTAL DARKNESS: 5.0 – 8.5 (AVERAGE 6.5)
DIRECT LIGHT: 2.0 – 4.5 (AVERAGE 3.0)

BLOOD PRESSURE: 120 - 140 SYSTOLIC
70 - 90 DIASTOLIC.

BODY TEMPERATURE: 98.6 +/- 1.0 DEGREE

1. SOMA, QUAALUDES AND SOME ANTI-DEPRESSANTS USUALLY DILATE PUPILS
2. QUAALUDES, ETOH AND POSSIBLY SOME ANTI-DEPRESSANTS MAY ELEVATE
3. CERTAIN PSYCHEDELIC AMPHETAMINES CAUSE SLOWING
4. NORMAL BUT MAY BE DILATED
5. DOWN WITH ANESTHETIC GASES, BUT UP WITH VOLATILE SOLVENTS AND AEROSOLS
6. PUPIL SIZE POSSIBLY NORMAL